OPINION.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 16,446.

Charles Edward Anderson Berry, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[October 28, 1960.]

Before Sanborn, Woodrough and Matthes, Circuit Judges.

Per Curiam.

Charles Edward Anderson Berry, thirty-three years of age and a married man, is a musician, entertainer, actor, song writer, and stockholder in Chuck Berry Music Corporation, which owns a night club in St. Louis, Missouri, known as "Chuck Berry's Club Bandstand". Berry is a Negro. He was, on December 23, 1959, charged by indictment with having knowingly transported in interstate commerce from El Paso, Texas, to St. Louis, Missouri, a girl known as Janice Norine Escalanti, with the intent to induce her to engage in immoral practices; a violation of 18 U. S. C. § 2421. To the indictment, Berry entered a plea of not guilty. He was tried to a jury, found guilty, and

on March 11, 1960, sentenced to five years' imprisonment and to pay a fine of $5,000. He has appealed.

On Berry's behalf it is contended that his motion for a directed verdict of acquittal, made at the close of the evidence, should have been granted on the ground of the insufficiency of the evidence to show the intent necessary to make his transportation of the girl a criminal offense. It is also contended that he did not have a fair trial because of "the hostile and prejudicial conduct and remarks of the trial court," and that the trial judge erred in certain rulings on evidence and in his instructions to the jury.

We think it would serve no useful purpose to discuss this case in detail. If there is to be a retrial, the rulings on evidence of which complaint is made are unlikely to recur, and we doubt that any of them affected the defendant's substantial rights. See **Heglin v. United States**, 8 Cir., 27 F. 2d 310, 313. The charge of the trial court as a whole was, in our opinion, adequate, fair and accurate. Berry was not entitled to a directed verdict of acquittal. There was ample circumstantial evidence of his intent, when he picked up the girl in El Paso, to make the issue of his guilt one for the jury. See and compare: **Shama v. United States**, 8 Cir., 94 F. 2d 1, 4 and cases cited; **Dunn v. United States**, 10 Cir., 190 F. 2d 496, 498; **United States v. Mathison**, 7 Cir., 239 F. 2d 358, 360-361; **Garner v. United States**, 8 Cir., 277 F. 2d 242, 245. What a man does is often more indicative of his intent than what he says. Intent, like any other fact, may be circumstantially proved. "Triers of fact are constantly called upon to determine the intent with which a person acted." **Commissioner v. Culbertson**, 337 U. S. 733, 743. The evidence of the Government with respect to the relations existing between Berry and the girl on the trip from El Paso, Texas, to St. Louis, Missouri, and after their arrival in St. Louis, amply justified an inference that his initial intent in transport-

ing her was to have her engage in immoral relations with him.

What has given us concern is whether the attitude, conduct and remarks of the trial judge which are complained of, must be held to have made the trial unfair. This Court has not been unduly critical of sharp remarks made by a trial judge to counsel for a defendant with respect to rulings on evidence. In **Goldstein v. United States**, 8 Cir., 63 F. 2d 609, 613, it was contended that misconduct of the trial judge required a reversal of a conviction. This Court, after quoting what was said in **Sutherland v. United States**, 8 Cir., 19 F. 2d 202, 216, about a fair trial meaning "a trial before an impartial judge, an impartial jury, and in an atmosphere of judicial calm," went on to say (page 613 of 63 F. 2d):

> "It is not always possible during the trial of a hotly contested case for a judge, however impartial he may be, to maintain in the courtroom that atmosphere of complete judicial calm which is so much to be desired. We must not overlook the fact that the human element cannot be entirely eliminated from the trial of lawsuits. While counsel owe to the court, because of the position which he occupies, the utmost deference and respect, and while the court owes to them an equal obligation of courtesy and patience and consideration, nevertheless sharp differences of opinion do arise in the heat of trial and things are said which were better left unsaid. * * * An appellate court should be slow to reverse a case for the alleged misconduct of the trial court, unless it appears that the conduct complained of was intended or calculated to disparage the defendant in the eyes of the jury and to prevent the jury from exercising an impartial judgment upon the merits."

No matter how objectionable a character Berry may have been or how strong the evidence against him, he was

unquestionably entitled to a full and fair trial. It seems safe to say that ordinarily a trial judge who, in the presence of the jury, makes remarks reflecting upon a defendant's race or from which an implication can be drawn that racial considerations may have some bearing upon the issue of guilt or innocence, has rendered the trial unfair. Compare, **Skuy v. United States**, 8 Cir., 261 Fed. 316, 319-320, in which a new trial was ordered because counsel for the government made derogatory remarks about witnesses of the Jewish race.

We find it unnecessary in the instant case to set out in this opinion the remarks complained of. Many of them, viewed in isolation, would probably not rise to the dignity of reversible error. Each of us has carefully reviewed and considered the record as a whole, and each of us has reluctantly come to the conclusion that the trial accorded Berry was unfair because of the attitude of the trial judge toward him, as evidenced by remarks made during the course of the trial.

In fairness to the trial judge, it should be said that much occurred to try his patience. The record shows that he had difficulty in hearing witnesses; that he apparently was in physical discomfort much of the time; that the trial dragged; that he was unable to see eye-to-eye with counsel in their conduct of the trial; that there was convincing evidence that Berry's treatment of the girl named in the indictment—who was a fourteen-year-old Apache Indian who had become a prostitute—was inexcusable; and that his testimony about his intention in transporting her in his automobile from El Paso to St. Louis being to make an honest woman of her, had its irritating aspects.

Nevertheless, as we have said, Berry was entitled to a fair trial, and we are convinced that the "conduct [of the trial court] complained of was intended or calculated to disparage the defendant in the eyes of the jury and to

prevent the jury from exercising an impartial judgment upon the merits" within the meaning of **Goldstein v. United States**, supra, page 613 of 63 F. 2d.

The judgment appealed from is vacated, and the case is remanded to the District Court for a new trial before a judge to be designated by the Chief Judge of that court.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT.

United States Court of Appeals
For the Eighth Circuit.

No. 16,446. September Term, 1960.

Charles Edward Anderson Berry,
Appellant,

vs.

United States of America.

Appeal from the United States District Court
for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, vacated.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court for a new trial before a judge to be designated by the Chief Judge of that Court.

October 28th, 1960.

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JAMES R. BROWNING, Clerk

No. 545

In the Supreme Court of the United States

OCTOBER TERM, 1960

CHARLES EDWARD ANDERSON BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington 25, D. C.

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CITATION

Case:

Dunn v. *United States*, 190 F. 2d 496 3

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 11-15) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 28, 1960. The petition for a writ of certiorari was filed November 25, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals should have directed a judgment of acquittal on the evidence instead of remanding for a new trial.

STATEMENT

The petitioner was convicted in the United States District Court for the Eastern District of Missouri of having transported a girl from El Paso, Texas, to St. Louis, Missouri, for immoral purposes. On appeal, the Court of Appeals reversed the judgment of conviction and remanded the case for a new trial on the ground that the trial was unfair.[1] In its opinion, the court noted that the evidence "amply justified an inference" that the petitioner's initial intent in transporting the girl (who was 14 years old at the time, although she had told petitioner she was 21) was to have her engage in immoral relations with him. The petitioner challenges this ruling and seeks to have this Court decide that he should have been granted a verdict of acquittal.

ARGUMENT

There is no occasion for this Court to review the interlocutory judgment of the Court of Appeals remanding the case for a new trial. There is no dispute as to the applicable principles; the question is entirely one of the inferences to be drawn from the evidence. If the petitioner's purpose in transporting the girl from Texas to Missouri was primarily to give her employment, the fact that he later decided to have sexual relations with her would not render him guilty; if his initial purpose was to have sexual relations with her, and the offer of employment was incidental to the means of making such sexual relations possible,

[1] The government in its brief in the court below had conceded that the jury might have been prejudiced against the petitioner by allusions of the trial judge to his race. The Court of Appeals agreed with this concession.

the petitioner was guilty of a federal offense. This was properly a jury question in this case. The evidence in this case was that, after meeting the girl in El Paso, the petitioner asked her to work for him (R. 12); that she sold pictures for him that night and then they left for Tucson with his band, arriving about 9:30 in the morning (R. 13-15). The petitioner had sexual relations with the girl that morning (R. 18), throughout the trip back to St. Louis, and after they returned from St. Louis (R. 23-24, 26-27, 29-30, 37-38).[2] This evidence was sufficient to justify submission to the jury of the issue of the petitioner's intent when he transported the girl. *Dunn* v. *United States*, 190 F. 2d 496 (C.A. 10), and cases cited.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

DECEMBER, 1963.

[2] Contrary to statements in the petitioner's brief, there was corroborating evidence in the form of testimony that the petitioner and the girl occupied the same room in Tucson (R. 128-131, 141-142) and in Denver (R. 146, 171-172).